國際學碩士學位論文

The Regulatory Development and the Future Challenge for the Regionalization Provision of the WTO SPS Agreement

WTO SPS 협정의 지역화 조항에 관한 연구

2018 年 2 月

서울大學校 國際大學院

國際學科 國際通商 專攻

김 재 경

The Regulatory Development and the Future Challenge for the Regionalization Provision of the WTO SPS Agreement

A thesis presented by

Kim, Gaegoung

A dissertation submitted in partial fulfillment of the requirements for the degree of Master of International Studies (International Commerce)

Graduate School of International Studies
Seoul National University
Seoul, Republic of Korea

February 2018

ABSTRACT

Article 6 of the WTO SPS Agreement on adaptation to regional conditions allows Members to subdivide their national territory according to the level of pest or disease prevalence, and continue trade in areas that have been scientifically verified as disease-free. However, owing to the simplicity of the Article, Members have frequently experienced difficulties in implementing the regionalization concept. Thus, enhancing the implementation of Article 6 has been one of the essential goals of the WTO Member countries and the SPS Committee ever since the establishment of the regionalization provision in 1995. Nevertheless, despite the series of discussions undertaken at the WTO to add details to the provision, little improvement has been made. This thesis seeks to provide the implications for enhancing the implementation of the regionalization principle by examining the drafting history and the recent discussions within the WTO regarding Article 6. Furthermore, by analyzing a number of RTAs that include provisions on regionalization that go beyond the contents of Article 6 of the SPS agreement and drawing on past studies concerning the regionalization provision, this thesis points out the future challenges to enhancing the regionalization provision.

Keywords: SPS Agreement, Article 6, Regionalization, Regional Trade Agreement, WTO, SPS Committee

Student number: 2015-25128

Table of Contents

1. Introduction

The expansion of international food trade is posing greater challenges to food safety and human health worldwide. As a matter of fact, people today are becoming ever more conscious of pest and disease outbreaks abroad, cognizant of the fact that risks arising from infestations are no longer limited to the area of concern. In 2003 the detection of Bovine Spongiform Encephalopathy (BSE), also commonly known as the Mad Cow Disease in the United States (US) heightened the fear of US beef imports all over the world, and more recently, there was the 2011 Fukushima nuclear accident, which raised people's concern on imports of Japan's marine products. Recognizing the threats that trade can pose on human health, the World Trade Organization (WTO) contains a separate Agreement on Sanitary and Phytosanitary (SPS) measures, which maintains regulations to ensure human, animal and plant life or health. Yet, at the same time, the SPS Agreement contains a provision that fosters the facilitation of trade by allowing Member to continue trade even in instances of pest or disease infestations. This is achieved through Article 6 of the Agreement on adaptation to regional measures. Also called as regionalization, it allows Members to subdivide their territory according to the level of pest or disease prevalence and permit trade in uninfected areas. Therefore, regionalization is of

great significance, particularly for countries that take up large territories like the European Union (EU). However, despite its original intent of facilitating trade, implementation of Article 6 has been found to be difficult and costly, thus precluding Members, especially developing countries, from implementing the principle of regionalization. In this regard, series of discussions have been held at the WTO to add details to Article 6, but not much progress has been achieved.

Although numerous researches have been undertaken on SPS issues, few studies shed light on the regionalization chapter of the SPS Agreement. A previous study on regionalization was conducted by UNCTAD (2000), who focused on the difficulties that developing countries face in applying regionalization. As a solution to the problems, it proposed that procedures for regionalization should be simplified and that assistance should be given to developing countries in preparing requests for recognition of regionalization. Loppacher (2007) on the other hand pointed out that regionalization measures could create economic incentives to smuggle because products originating from uninfected areas become more expensive than products originating from infected areas. According to Loppacher, such price difference within a country creates incentives to smuggle products from infected areas into the uninfected areas, and therefore suggested that discussions on regionalization address the issue of economic incentives to smuggle.

This study explores the regulatory development of the regionalization principle and analyzes the issues discussed in the WTO as well as the recent developments that have been made concerning the regionalization chapter of the SPS agreement and offer what aspects remain to be addressed in improving the implementation of regionalization measures. This thesis is structured as follows: chapter II elaborates on how the regionalization principle was inserted into the WTO SPS Agreement and briefly introduces the relevant international organizations that maintain regionalization principle. Chapter III looks into the most recent discussion in the WTO to enhance implementation of the regionalization chapter and organizes the issues mentioned by the Members and their proposed solutions to the issues. Chapter IV provides a legal interpretation of Article 6 of the SPS Agreement and examine regionalization disputes brought under the WTO. Then, Chapter V explores what types of regionalization provisions are included in the Regional Trade Agreements (RTAs) and whether such provisions go beyond the principles laid out in the WTO SPS Agreement. Based on the observations, Chapter VI proposes what improvements should be made in the implementation of regionalization.

2. Background

2.1. Regulatory Development of the Regionalization Provision

Prior to the formulation of the concept by the WTO and the OIE, "regionalization" did not exist as an official term. However, historical evidence manifests that governments have applied "regionalization-like" measures to distinguish between infected and non-infected regions and accordingly adjusted trade measures.[1] For instance, the trade dispute between the United States and Britain in the late nineteenth century concerning bovine pleuro-pneumonia disease involved US efforts to sustain trade by convincing British authorities that its western territories remained free of the disease.[2] Further regionalization-like attempts can also be found in the list of notified health and sanitary regulations, provided by the GATT Agriculture Committee in 1970.[3] According to the document, New Zealand, which maintained import restrictions on canary seeds and millet remarked that it would permit exports of canary seeds and millet originating from regions that have been proved to be clean of infections. Likewise, Norway too showed evidence of considering regionalization by noting that its authorities would lift import bans on poultry exports from certain

[1] Kastner (2011), p.138.
[2] Ackleson and Kastner (2011), p.16-17.
[3] see COM.AG/W/68/Add.4.

regions of Canada if health and sanitary conditions of those areas have been found to be satisfactory.

2.1.1. Introduction of the Theoretical Concept

Yet, discussions on introducing the concept of regionalization into the WTO were not brought up until the Uruguay Round of multilateral trade negotiations when full-fledged efforts were exerted to elaborate on Article XX(b). The first country to raise concern regarding the issue was the European Community (EC). In its Draft Working Paper on a Framework for Sanitary and Phytosanitary Regulations issued in 1988, the EC stressed that risk assessment of health measures should be able to be carried out on a regional basis so that import bans can be applied to specific parts of the country.[4] In that same year, the Nordic countries also submitted a communication on Sanitary and Phytosanitary Issues, underlining the importance of recognizing the inherent differences between regions within a country.[5]

With surfacing discussions on regionalizing SPS measures, the Cairns Group for the first time laid out the principle of regionalization in 1989, stipulating that "recognition of disease/pest free areas, whether within part of a country or in a geographic region which may include areas of several countries, will be based on factors such as: geography, ecosystems, epidemiological

[4] MTN.GNG/NG5/W/56.
[5] MTN.GNG/NG5/W/88.

surveillance and sanitary and phytosanitary control and should be verifiable by scientific evidence."[6] The EC, while claiming support of the Cairns Group proposal of the recognition of pest or disease-free areas, added on that recognition of free areas should also be based on factors such as nature and transmission patterns of the disease or pest, surveillance and control efficiency.[7] At this point of time, the Cairns Group had already elaborately set down the basic concept of pest- or disease-free areas, which closely parallel the language used in Article 6.2 of today's SPS Agreement.

In February 1990, the US recommended the International Office of Epizootics (OIE) to come up with guidelines for imposing trade restrictions with respect to the Foot-and-Mouth Disease (FMD). The US specifically proposed that the OIE devise guidelines for "evaluating the appropriateness of FMD import restrictions based on a determination of an acceptable level of zoosanitary risk" and claimed that the presence of free areas could be one of the factors to be determined for risk assessment.[8] The OIE responded to the US proposal in May 1990, claiming that establishment of a draft program of work is underway, which would include the study of the epidemiology of the disease

[6] MTN.GNG/NG5/W/112, para. 8.
[7] MTN.GNG/NG5/W/146.
[8] MTN.GNG/NG5/WGSP/W/12, para. 3.

that would help establish a revised definition of the terms "disease-free country", "disease-free area" and "infected area."

However, not all countries were satisfied with establishing a harmonized rule on regionalization. Japan expressed concern over introducing a harmonized concept for disease-free areas, referring to the volatility of the characteristics or infection patterns of pests and diseases, geographical conditions or preventive measures.[9] Thus, Japan emphasized that countries should bilaterally undergo a thorough examination in determining the presence of pests or diseases in a certain area on the grounds of scientific evidence. Austria held a similar perspective. It asserted that Members should take into account the different variables in developing an enhanced SPS measure, because different conditions prevail in different countries and regions. In addition, Brazil and Colombia raised concern on behalf of the developing countries. They briefly mentioned that while the primary objective of the SPS regulation should be to eliminate disguised barriers to trade, negotiations on the SPS issue should also reflect the concerns of the developing countries. In this regard, they pleaded that Members pay particular attention to the concepts "free

[9] MTN.GNG/NG5/W/156.

areas within a country", "areas under sanitary control" and "acceptable level of risks."[10]

Subsequently in April 1990, the Cairns Group submitted a supplementary communication, in which it introduced a new concept, "areas of limited pest or disease prevalence."[11] In addition to pest- or disease-free areas, the Cairns Group alleged that Members should also recognize areas of limited pest or disease prevalence, which are areas of low risk with guarantee of sanitary or phytosanitary control and added that determination of such areas should be based on the same factors listed for determining pest- or disease-free areas.

2.1.2. Drafting of Rules

In the following month, the Nordic Countries prepared a draft agreement on SPS measures reflecting the mid-term review and the various position papers submitted by the Working Group and other delegations. The provision on regionalization was also inserted into this draft. Article 4.1 of the draft agreement starts by acknowledging that products originating from pest- or disease-free areas should be given more favorable treatment compared to products originating from other areas. In connection to Article 4.1, Article 4.2 provides that stricter SPS measures may be applied for pest- or disease-free

[10] MTN.GNG/NG5/W/132, para.17.
[11] MTN.GNG/NG5/W/164.

regions. Article 4.3 provides the definition of a disease- or pest-free region, constituting that such region may be a whole or part of a country, or even areas of several countries. Then, Article 4.4 requires countries to provide necessary proof for maintaining that certain areas within their territory is free of pest or diseases. It also suggests that the importing party is responsible for conducting appropriate inspections and tests to make sure that the areas of the exporting country are indeed free of disease or pest and will remain so. Lastly, Article 4.5 lists the works that should be implemented by relevant international organizations.[12] Although the draft agreement is very much different from today's SPS Agreement, it for the first time provided a concrete legal framework of regionalization.

In the eight meeting of the Working Group on SPS regulation and barriers, further discussions were held on advancing the regionalization provision in the draft agreement on SPS measures.[13] Several suggestions were made in the meeting. The Working Group pointed out that the demarcation of pest- or disease-free areas go beyond the obligation of the GATT and thus, relevant international organizations are responsible for devising guidelines for the determination of such areas. Moreover, a participant opined that regionalization should involve not only measures but also guarantees such as

[12] MTN.GNG/NG5/WGSP/W/21.
[13] see MTN.GNG/NG5/WGSP/W/24.

guarantees on the adaptation of export conditions to the sanitary situation within the importing area. The necessity of bilateral arrangements was also emphasized in the meeting. One participant mentioned that while relevant international organizations are responsible for establishing the criteria for determining a pest or disease-free area, it asserted that resolutions on whether or not to accept an area as free of diseases or pest should be proceeded through bilateral negotiations between the countries concerned.[14] Another participant also added on that dialogues on whether the criteria meets the adequate levels of control should also be made in such bilateral talks. Furthermore, some others asserted that regionalization should elaborate on areas of limited pest or disease prevalence and that the criteria for determining such areas should be requested to be developed by the relevant international organizations.

As a result of the active discussion, a draft text for the for the framework of an Agreement on SPS measures was prepared on June 28th 1990 reflecting the suggestions that were brought up at the eight meeting of the Working Group. Finally in 1995, along with the establishment of the WTO, the SPS Agreement, including Article 6 on *Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence* came into effect.

[14] MTN.GNG/NG5/WGSP/W/24, para.10.

2.2. International Standards on Regionalization

For the purpose of promoting harmonized use of SPS measures among Member countries, the SPS Agreement recognizes guidelines and recommendations devised by certain International Standard Setting Bodies (ISSBs). Also called as "sister organizations", the international bodies include the Codex Alimentarius Commision, which is primarily concerned with food safety; the International Office of Epizootics (OIE), which is responsible for animal health and safety; and lastly, the relevant international and regional organizations under the framework of the International Plant Protection Convention (IPPC), which is concerned with phytosanitary measures. Among the sister organizations, only the OIE and the IPPC maintain guidelines for recognizing regionalization measures.

2.2.1. Animals: World Organization for Animal Health (OIE)

The OIE specifies the general criteria for obtaining and maintaining a disease-free status in its Terrestrial Animal Health Code and indicates requirements for fulfilling the disease free status for diseases such as Foot-and Mouth Disease, Classical Swine Fever, Newcastle Disease and Avian Influenza.[15] The definition of a "free zone" is entrenched even in the earliest works of the OIE, ever since the first edition of the Terrestrial Animal Health

[15] Micara (2016), p.116-117.

Code published in 1968.[16] Yet, as Members came to acknowledge the significance of recognizing the free zones in considering the import risk analysis, discussions were held in 1992 for proposing and drafting a new chapter on zoning and regionalization.[17] As a result, a separate chapter on zoning and regionalization was inserted into the Terrestrial Animal Health Code in 1998. Later, with the adoption of the concept of a "compartment" in 2003, the chapter on zoning and regionalization was replaced with zoning and compartmentalization in 2004.

While zoning and compartmentalization are both applied as means to define the health status of animal subpopulation within a territory for the purpose of disease control and trade facilitation, there is a fundamental dissimilarity between a zone and a compartment. A zone is defined primarily on a geographical basis such as natural, artificial and legal boundaries, whereas a compartment is defined by management and husbandry practices related to biosecurity.[18] However, the use of zoning is more popular among countries, since OIE recognition of a free zone helps a country gain market access for its

[16] See OIE International Zoo-Sanitary Code (1968).
[17] OIE final report (1992).
[18] OIE Terrestrial Animal Code.

exports even though not all of its importing counterparts may automatically accept OIE recognitions.[19]

2.2.2. Plants: International Plant Protection Convention (IPPC)

As the only plant health standard setting body recognized by the WTO SPS Agreement, the main role of the IPPC is to establish effective international standards for preventing and controlling plant pests.[20] The IPPC was adopted by the Food and Agriculture Organization of the United Nations (FAO) in 1951 and came into force in the following year. The IPPC documentation of the definition of pest free areas and areas of low pest prevalence was adopted in the 27th Session of FAO Conference in 1993, when negotiations on the SPS Agreement was underway in the Uruguay Round.[21] In the subsequent years, the IPPC developed four International Standards for Phytosanitary Measures (ISPMs) relevant to the regionalization measures for plant protection. The standards include requirements for the establishment of pest-free areas (ISPM No. 4); requirements for the establishment of pest-free places of production and production sites (ISPM No. 10); requirements for the establishment of areas of low pest prevalence (ISPM No. 22); and recognition of pest free areas and areas

[19] Kahn and Llado (2014).
[20] Devorshak (2007).
[21] See ISPM 1 (1993).

of low pest prevalence (ISPM No. 29).[22] However, unlike the OIE, which autonomously grants recognition for disease-free areas, the IPPC hold the National Plant Protection Organizations (NPPOs) responsible for issuance of phytosanitary certifications, implementation of pest free areas and pest eradication programs.[23]

3. Recent Discussions on Regionalization in the WTO

3.1. SPS Enhanced Informal Meeting on Article 6

In January 2006, the SPS committee of the WTO held an enhanced informal meeting on Article 6 to discuss on ways to improve the implementation of regionalization measures. In this meeting, several Member countries shared their own experiences with recognizing pest- and disease-free areas. In light of their experience with the implementation of regionalization, numerous Members acknowledged that while regionalization is an effective means of expanding trade, obtaining a pest- or disease-free status and maintaining it incur large costs. Members viewed such rising uncertainties as a big threat to investments in regionalization. The issue was more serious for developing countries that are large exporters of agricultural products. The three

[22] Gruszczynski (2010).
[23] Devorshak (2012).

major issues addressed in the informal meeting on Article 6 were: undue delays, acknowledgement of OIE recognitions and non-discrimination.

3.1.1. Undue Delays

Undue delays were of a primary concern to most Member countries. In its communication that it submitted to the SPS committee, Peru insisted that the unpredictable duration of time it takes for attaining recognition of zones from the importing country albeit the fact that Peru is in compliance with the guidelines established by the relevant international organizations make application of regionalization costly and problematic.[24] It attributed such shortcomings of the actual implementation of regionalization to the lack of a fundamental definition of the administrative procedures, volatility of requirements necessitated by the importing countries and the sluggishness of process. Colombia too held a similar view, ascribing the rise of undue delays to the unclearly defined, convoluted and time-consuming administrative procedures of importing countries for recognizing free zones.[25]

Colombia's experience well reflects the problem of undue delays. In November 2003, Colombia submitted a request for recognition of its free zones to the US. In September 2004, the US responded that Colombia should elucidate nine points made in its application and opined that it is more fond of

[24] G/SPS/GEN/607, para. 9.
[25] G/SPS/GEN/611, para. 7.

recognizing a smaller area within the free zone for trade in meat instead of recognizing the whole zone. Conforming to the US request, Colombia offered a new application for recognition of a smaller area. In April 2005, the US claimed to be still in progress reviewing the request and in May 2005 Colombia provided supplementary documents requested by the US. Consequently, after numerous delays it was not until November 2005 when Colombia could receive an assessment of its request from the US. Regarding undue delays, Egypt too lamented the occurrence of undue delays in the process of obtaining annual certificates in response for its market access, which eventually endured until after its farming season was already over.[26]

In addition, upon observation, Argentina provided a more comprehensible list of the causes of undue delays, which it categorized into three distinct categories: problems relating to domestic considerations in the importing country, problems relating to the bilateral relationship between the importer and the exporter, and problems relating to international reference standards.[27] The problems cited under the first category includes outdated domestic laws that fail to address regionalization, absence of clear procedures for regionalization, lack of human and financial resources, absence of a clear definition on the Appropriate Level of Risk (ALOP) and failure of the political

[26] G/SPS/GEN/630, para. 12.
[27] G/SPS/GEN/606.

decision-makers to provide a clear definition of ALOP. As for the second category, Argentina mentions issues derived from insufficient knowledge of the importing country about the nature of the disease at issue, numerous requests imposed on a single country, recurrent requests for information, pressures exerted on regulatory bodies, failure of different systems to communicate and lack of experience in the field of health services. Lastly, regarding the third category, Argentina states that indifference of Members for recognition of free areas and lack of recognition from OIE cause further unwarranted delays in situations when recognition have not been granted by the OIE.[28]

As a solution to remove the insecurities coming from undue delays and the variances in the importing country's requests, most Member countries commonly agreed that the ISSBs and the SPS Committee should play a pivotal role in establishing a harmonized guideline. Japan determined that the primary role of the SPS Committee is to interpret the SPS Agreement and the supplementary decisions so that SPS measures are not carried out in a way that impede international trade. In addition, Japan was in agreement with the view that the SPS Committee should come up with administrative guidelines but contended that Members should take into account that technical and administrative guidelines are closely related and that SPS Committee's work

[28] G/SPS/GEN/606.

could bring about confusion resulting from duplications of the guidelines established by the international organizations. On the other hand, Japan held the international organizations responsible for developing "technical and scientific criteria or guidelines regarding the establishment, assessment and recognition of pest- or disease-free areas and low pest or disease prevalence."[29] While responsible for developing technical guidelines, Japan insisted that the ISSBs develop both technical and administrative guidelines, taking Members' experiences into account. Japan also elaborated on the role of the Members, suggesting that the exporting and importing Members exchange information and decide on the measure that achieves the ALOP.

While conforming to Japan's view, Canada pointed out the difficulty of drawing a line between the administrative and technical issue in setting up a guideline for undue delays, as technical issues are embedded in the administrative guidelines.[30] According to Canada, due to the inseparable nature of administrative and technical issues, the development of a guideline solely on the issue on undue delays should be based on the thorough technical knowledge required for recognizing free areas and areas of low pest- or disease- prevalence. Canada agreed with the ISSB's development of guidelines on the application of Article 6. Yet, it expressed that if further details are deemed to be necessary

[29] G/SPS/GEN/605, para. 9.
[30] G/SPS/GEN/613, para.18.

after the drafting of the guidelines, the SPS Committee should inform the ISSBs and if the ISSBs do not respond, the SPS Committee should proceed to establish additional guidelines.

Furthermore, Colombia briefly expressed support of the need for establishing a harmonized guideline on the procedures for recognition of regionalization so that time constraints are assigned for each of the stages in the application of Article 6.[31] Yet, contrary to other Members' opinion that the ISSBs and the SPS Committee should develop administrative guidelines including time limits to resolve the problem of undue delays, the US maintained that it is inappropriate to assign specific time limits for each of the recognition procedure due to the different requirements that are necessitated for the purposes of warranting transparency and the volatility of the cases.[32] Therefore, the US argued that time horizon should be determined case-by-case.

3.1.2. Acknowledgement of OIE recognition

In addition to undue delays, several Members also pointed to the issue of importing Members' failure of recognizing OIE recognition, which also play a role in provoking undue delays. As an example, Peru mentioned that despite the establishment of disease-free areas, which were officially acknowledged by the OIE, this recognition did not result in an "automatic" or "expeditious"

[31] G/SPS/GEN/611, para. 7.
[32] G/SPS/GEN/631, para. 9.

recognition as disease-free areas by the importing countries.[33] Peru shared its experience in connection to this issue. As a consequence of its vast investments in eradicating foot-and-mouth disease, 97.6 percent of its territory was recognized as FMD-free without vaccination and the remaining 2.4 percent was recognized as FMD-free with vaccination by the National Agrarian Health Authority.[34] Upon request, the OIE recognized about half of the territory as FMD-free without vaccination. Yet despite OIE's recognition, Peru's request for recognition of FMD-free areas to the importing countries were rejected.

Colombia and Argentina also briefly brought up the problem of importing countries' disregard to recognition of the OIE. Colombia provided that exporting countries experience difficulties because importing countries who are the main actors in recognizing regionalization often pay little attention to OIE recognition and the needs of the developing countries.[35] On the other hand, Argentina analyzed the reason why importing countries refuse to accept OIE recognition. One of the factors was that Members fall short of the understanding of the regionalization procedures due to their absence from the meetings. Another reason was that absence of a fast-track procedure for granting recognition for OIE recognized areas and the Members' decision to

[33] G/SPS/GEN/607, para. 12.
[34] G/SPS/GEN/607, para. 15.
[35] G/SPS/GEN/611, para. 5.

reiterate the recognition procedure despite the presence of OIE recognition accounts for the negligence to OIE recognitions.[36]

Peru attributed to the different approach that IPPC and OIE take in applying the principles of Article 6 as a reason to the Members' defiance of the OIE recognition. In fact, the chief difference between the two organizations is that the OIE "provides recognition for some specific diseases", whereas the IPPC establishes guidelines regarding "the declaration of pest- or disease-free areas and for places or sites of production that are pest-free."[37] Noting the discrepancies, Peru insisted that the IPPC operate in the manner that the OIE works.

However, Japan expressed opposition of the view that a Member should automatically acknowledge the OIE recognition on regionalization. First of all, Japan indicated that pursuant to Article 3.3 of the SPS Agreement, Members are allowed to impose SPS measures that yield higher protection than the measures applied based on the international standards in the presence of adequate scientific justification. It hence, argued that according to this article, it is not obligatory for Members to comply with the OIE standard if they have scientific justification and that even though a Member's SPS measures follow the OIE standard, the ultimate right for deciding recognition of free areas

[36] G/SPS/GEN/606, para. 11.
[37] G/SPS/GEN/607, para. 11.

should be accorded to the Member country, since it is directly related to the Member's own risk assessment. Furthermore, indicating the fact that Member's decisions are made through active and thorough research by conducting on-site visits whereas OIE's recognitions are established based on the documents submitted by the Member countries, Japan asserted that the OIE's recognition can serve as a helpful information but does not necessarily mandate the Members to automatically recognize regionalization.

The US upheld Japan's perspective. Although the US acknowledged the usefulness of OIE recognition, it asserted that the OIE recognition does not serve to "substitute" Member's decision on recognition of regionalization.[38] The US likewise referred to Article 3.3 of the SPS Agreement as its basis for holding such a perspective. In addition, the US pointed out the fact that the resolutions for OIE recognition fail to address whether Members should consider the official judgment in the application of SPS measures and how such considerations should be made. Moreover, the OIE resolution state that individual Members are accountable for imposing measures that is congruous to the SPS Agreement.[39] According to the US, this statement provides evidence that OIE recognition does not automatically lead to recognition by Member countries.

[38] G/SPS/GEN/631, para. 2.
[39] G/SPS/GEN/631, para. 5.

3.1.3. Non-discrimination

Egypt briefly mentioned the issue of non-discrimination in its communication.[40] Egypt alleged to have faced large impediments in acquiring market access, owing to the importing country's lack of scientific justification for its measures, which resulted in an entire ban on potato exports from Egypt and granting priorities to certain suppliers and areas of harvest regardless of its disease-free status. However, Egypt noted that the importing country has not imposed such restrictions on other countries where the same disease prevail. Thus, Egypt proposed that countries do not discriminate between different exporting Members when applying regionalization.

3.2. Guidelines to Further the Practical Implementation of Article 6

Reflecting the Members' opinions shared in the 2006 informal meeting, the SPS Committee issued guidelines to further the practical implementation of Article 6 in 2008.[41] The guideline first elaborates on the general considerations that Members should take into account for recognizing regionalization measures. The importance of avoiding undue delays, not discriminating among Members and maintaining transparency throughout the process of recognition is

[40] G/SPS/GEN/630.
[41] see G/SPS/48.

underscored in this section. Next, the guideline lays out what elements should be clarified in the initial stage of discussion for recognizing regionalization. It suggests that Members address the general process and the expected timeframe of the whole recognition process if possible. In addition, acknowledging that discussions may have to be postponed due to the limited resources that the importing Member possesses for getting down to a new request for recognition, the guideline provides a list of factors that Members should consider for determining whether to delay the discussion. Then, the guideline establishes a detailed account of the administrative procedure for recognition of regionalization. It divides the recognition process into nine specific stages and indicates the responsibilities of both the importing and exporting Members for each of the stages.

The Committee also introduced guidelines for the expedited recognition process, which according to the Committee, "may involve exclusion of one or more stages or some parts of a stage of the importing Member's general process for the recognition of pest- or disease-free areas of low pest or disease prevalence."[42] According to the guideline for the expedited recognition process, importing Members may consider applying the expedited procedure under circumstances where the exporting country has already attained recognition

[42] G/SPS/48, para. 32.

from relevant international organizations. Members can also apply the expedited procedure if they are requesting recognition of an area that has been previously recognized as a pest- or disease-free area and in situations where the importing country is familiar with the exporting country's veterinary or phytosanitary services.

Moreover, the Committee claimed that it will constantly monitor Member's implementation of Article 6 and encouraged Members to notify the Committee of new request for recognition of zones and the importing country's decision for the request. The Committee also encouraged Members to share their experience regarding regionalization so that the Secretariat can prepare annual reports and submit it to the Committee.

4. Legal Application of the Regionalization Principle

4.1. Understanding Article 6: Adaptation to Regional Conditions

Article 6 of the SPS Agreement is comprised of three paragraphs:

> Article 6
> *Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence*
>
> 6.1 Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area – whether all of a country, part of a country, or all or parts of several countries – from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region,

> Members shall take into account, inter alia, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.
>
> 6.2 Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.
>
> 6.3 Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

The first sentence of Article 6.1 of the SPS Agreement obliges Members to adapt their sanitary or phytosanitry measures to the characteristics of the area where a product originates from and is destined to. Then it elaborates on the scope of the mentioned area, which may be all of a country, part of a country, or all or parts of several countries. The significance of Article 6.1, first sentence is that it lays out the definition and scope of a "region."[43] It implies that the boundary of a region differs from the administrative boundary of a country,

[43] Rudiger *et al* (2007).

since a region can be a smaller part of a country or smaller parts of several countries.

The second sentence of Article 6.1 elaborates on the procedural requirement, writing down a non-exhaustive list of factors that Members shall take into account when assessing the sanitary or phytosanitary characteristics of a region. The list includes the level of prevalence of specific diseases or pests; the existence of eradication or control programmes; and appropriate criteria or guidelines, which may be developed by the relevant international organizations. However, Article 6.1 does not provide a clear explanation on how to interpret the phrase "take into account". Instead, the Panel of the Japan – Apple case cast light on this matter. It noted that the expression "take into account" denotes a softer obligation compared to languages such as "in conformity with" or "based on". On this basis, it concluded that failure to consider each and every element enumerated in Article 6.1 does not lead to the violation of the Article, although it may be a useful indicator in determining whether Members are respecting the rules.[44]

Moreover, the relevant international organizations are not specifically identified in Article 6.1. Annex A(3) of the Agreement designates the three sister organizations as the relevant international organizations, but there is no

[44] Gruszczynski (2010), p.252.

clear evidence that the international organizations are limited to those specified in Annex A(3), but in practice, the IPPC and the OIE are the only two organizations that have established guidelines regarding regionalization. Article 6.1 reveals further ambiguities by failing to delineate the relationship between area and region.[45] Region and area however, seem to be used interchangeably, based on the observation that both region and area is used in the same context and noting that the first and second sentences of Article 6 are interdependent.

Article 6.2 adds on to the substantive obligation of Article 6.1, obliging Members to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence and further provides that recognition of such concepts should be based on a non-exhaustive list of factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls. Detailed definitions of the terms "pest- or disease-free area" and "areas of low pest or disease prevalence" are presented in Annex A(6) and Annex A(7) of the SPS Agreement respectively. The primary difference between the two terms is that the former describes areas where pests or diseases are completely nonexistent, whereas the latter refers to areas where pests or diseases prevail, but below certain intensity. Nonetheless, in reality, pest- and disease-free areas are determined according to "readily established boundaries"

[45] Scott (2007), p.181.

such as administrative borders or geographical features that roughly match the pest- or disease-free status of an area.[46] As for areas of low pest and disease prevalence, the concept in practice is used "when the ALOP of the exporting country is not so high as to require the products to originate from disease- or pest-free areas."[47] This suggests discrepancies in the legal definition and the real world implementation of Article 6.

In addition, Article 6.2 requires Members to recognize the "concept" of pest- or disease-free areas and areas of low pest or disease prevalence. Such language is rather obscure as it is possible to recognize an abstract concept without putting it into actual practice. However, such an interpretation invalidates the enforcement of Article 6.2.[48] In addition, Article 6.2 demands that Members determine the recognition of areas "based on" the enumerated factors. The phrase "based on" also appears in Article 3.1 and 5.1 of the Agreement where it in both instances require substantive obligation, illustrating "a strong relationship in the former and rational or reasonable relationship in the latter."[49] Yet, according to Scott, the committee and/or the Appellate Body (AB) are ultimately responsible for identifying the substantive relationship

[46] Rudiger *et al* (2007), p.473.
[47] Gruszczynski (2010), p.254.
[48] Scott (2007), p.185.
[49] Scott (2007), p.185.

implicit in Article 6.2.[50] Similar concerns exist in the interpretation of the note to Annex A(6) of the Agreement. Note to Annex A(6) also writes down a list of factors that account for the regional control measures. Nevertheless, it does not indicate the degree of significance assigned to each of the factors. It can merely be assumed that the proximity or contingency of territory is not a decisive factor in determining pest- or disease-free areas.[51]

Mere adaptation of SPS measures to regional conditions does not lead to an immediate recognition of pest- or disease-free areas or areas of low pest or disease prevalence. As stated in Article 6.3, exporting Members are responsible for providing the necessary evidence to the importing Member, which proves that areas within their territories are, and are likely to remain pest- or disease-free areas or areas of low pest or disease prevalence. For the investigation of such areas, the second sentence of Article 6.3 requests exporting Members to give reasonable access to the importing Members upon request.

Yet, Article 6.3 lacks several important details. First of all, the threshold for "likelihood" is nowhere described.[52] Annex A(4) of the agreement uses the term "likelihood" in defining risk assessment, but does not elucidate the threshold of "likelihood". Based on the discussion of the AB in the EC –

[50] Scott (2007), p.185.
[51] Scott (2007), p.186.
[52] Scott (2007), p.185.

Hormones case[53] however, it would be sensible to assume that Members do not have the autonomy to reject an exporting country's regionalization request wary of "theoretical uncertainty" that the area concerned will not remain pest- or disease-free.

Second, Article 6.3 fails to specify the time horizon necessary for evaluating pest- or disease-free area or area of low pest or disease prevalence, which is also omitted by relevant international organizations. Based on intuition, the time horizon should be neither too long nor too short.[54] Long duration for assessing a pest- or disease-free area may invalidate Article 6.2 due to the nature of SPS measure, which makes it difficult to come up with accurate SPS measures for the future. In contrast, excessively short time horizon may infringe Member's right to establish their Appropriate Level of Protection (ALOP).[55]

4.2. Case Study

Past disputes concerning the adaptation to regional conditions reveal new facts on how to interpret Article 6 of the SPS Agreement. As of January 2018, there are three disputes involving Article 6. This chapter gives account of

[53] The AB of the EC – Hormones case noted that risk assessment of SPS measure elicits 'theoretical uncertainty', due to the nature of science, which cannot guarantee that certain content will never cause adverse effects. The AB therefore concluded that Members should not guard against such 'theoretical uncertainty' for the purpose of SPS protection. (WT/DS26/AB/R, para. 186)
[54] Gruszczynski (2010), p.255.
[55] Gruszczynski (2010), p.255.

all three cases. Table 1 provides the general information of the disputes on regionalization.

Table 1. WTO disputes involving Article 6 of the SPS Agreement

Case	Complainant	Respondent	Circulation of Panel Report	Circulation of AB Report
India – Agricultural Products (DS430)	US	India	14 Oct 2014	4 June 2015
US – Animals (DS447)	Argentina	US	24 July 2015	X
Russia – Pigs (DS475)	EU	Russia	19 Aug 2016	23 Feb 2017

4.2.1. India – Agricultural Products Case

The US initiated the dispute against India's imposition of import restrictions on certain agricultural products concerning the spread of Avian Influenza (AI). [56] The India – Agricultural Products case involves issues concerning regionalization of SPS measures, with the US claiming that India acted inconsistently with Article 6.1 and 6.2 of the SPS Agreement by prohibiting imports of certain agricultural products, albeit the fact that it originates from areas thousands of kilometers away from reported areas of AI presence.

[56] According to the World Health Organization (WHO), AI is "an infectious viral disease of birds (especially wild water fowl such as ducks and geese), often causing no apparent signs of illness." Being a highly contagious disease spreading through both direct and indirect contact, some AI virus can infect human, although most AI viruses do not (WT/DS430/R, para. 2.6).

In response to the US claim that India is inconsistent with Articles 6.1 and 6.2, India argued that its obligation under Articles 6.1 and 6.2 does not come into effect until the US as an exporting country has thoroughly provided the documents pertaining to the obligations written under Article 6.3 of the Agreement. In this regard, the Panel first examined whether the subparagraphs of Article 6 constitute some kind of sequence or formalities. Initially considering the different language used in the subparagraphs such as "ensure" or "recognize", the Panel alleged that each subparagraphs assign different responsibilities to Members. The Panel observed that Article 6.1 makes certain that Members' SPS measures are "suited" to the SPS characteristic of an area from which a product originated and to which it is destined, while Article 6.2 "requires Members to acknowledge 'concepts' or 'abstract ideas'."[57] Looking at the different properties of the two subparagraphs, the Panel concluded that based on logic, Members should have first acknowledged the concepts in order to adapt their SPS measures to the SPS characteristic of certain areas.

Next, in investigating the relationship between the first two subparagraphs of Article 6 and Article 6.3, the Panel found no connection between Article 6.3 and the first two subparagraphs of Article 6. Neither did it find indications of any other general obligations with regards to adapting SPS

[57] WT/DS430/R, para.

measures to the SPS characteristic of certain areas or in recognizing the concepts of different areas. Besides, the Panel noted that the language of the first sentence of Article 6.1 suggests that it is an independent obligation, which provides support for the argument that Article 6.1 does not imply any presence of conditionality linked to Article 6.3. In the meanwhile, the Panel observed the possibility of a linkage between the second sentence of Article 6.1 and the first sentence of Article 6.3, as the list of factors Members shall take into account in assessing the sanitary or phytosanitary characteristics of a region could act as a helpful guideline for the exporting Member in providing the necessary evidence that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence.[58] Yet, the Panel acknowledged that given that the list provided in Article 6.1 is non-exhaustive, Article 6.1 does not reveal any signs of such correlation between the two articles. In addition, the Panel found it logical for Members to already have recognized the concepts of pest- or disease-free areas as noted in Article 6.2 prior to the determination of requesting or receiving the recognition of such areas. For these reasons, the Panel concluded that a Member's obligation under Article 6.1 and 6.2 is not prompted by Member's request for recognition under Article 6.3. India's

[58] WT/DS430/R. para. 7.676.

obligation under Article 6.1 and 6.2 was thereby found to be valid without the US request for recognition.

Hence, the Panel turned to investigate the US claim that India acted inconsistently with Article 6.1, first sentence by imposing a ban on imports of certain agricultural products that originate from areas distant from reported areas of AI presence, which according to the US, also led India to be inconsistent with Article 6.2, second sentence.[59] To start with, based on the finding that the term "area" and "region" used in Article 6.1 are similar, the Panel concluded that failure to ensure that the sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of an area as noted in Article 6.1, first sentence, automatically leads to the finding that the Member failed to take into account the factors listed in Article 6.1, second sentence for assessing the SPS characteristics of a region.[60] Likewise, with regards to Article 6.2, second sentence, the Panel found that determination of pest-or disease-free areas or areas of low pest or disease prevalence, presupposes the recognition of the concepts of such areas. Therefore, the Panel established that failure to recognize the concepts of pest-or disease-free areas and areas of low pest or disease prevalence stated in Article 6.2, first sentence,

[59] WT/DS430/R, para. 7.681.
[60] WT/DS430/R. para. 7.685.

concomitantly leads to the conclusion that the Member failed to determine such areas based on the listed factors in Article 6.2, second sentence.

After finding the relationship between each of the sentences of Article 6.1 and 6.2, the Panel initially looked into the US assertion that India's AI measure failed to comply with Article 6.2, first sentence because India did not recognize the concepts of disease-free areas or areas of low disease prevalence. In this connection, the Panel noted that Article 6.2, first sentence requires Members to "recognize the idea or notion of pest- or disease-free areas and areas of low pest or disease prevalence in the abstract."[61] Although Article 6.2, first sentence does not elucidate on how Members are supposed to recognize the concept of the mentioned "areas", the Panel contended that Members at least must not contradict the notion of areas when it comes to dealing with a disease that is relevant to the recognition of such areas.[62] In this regard, the Panel examined India's Livestock Act and S.O.1663(E). First, looking into the legal text of the Livestock Act, the Panel found no definite language that provides the possibility of recognizing the concepts of pest- or disease-free areas. Furthermore, in response to India's claim that Sections 3 and 3A of the Livestock Act imply the likelihood of recognition of the concepts of pest- or disease-free areas, the Panel acknowledged that Sections 3 and 3A indeed

[61] WT/DS430/R. para. 7.695
[62] WT/DS430/R. para. 7.698.

provide some discretion for authorities to determine pest- and disease-free areas; however, no evidence have been found on the Indian government's recognition of such areas. Subsequently, concerning S.O.1663(E), the Panel noted that S.O.1663(E) bans imports originating from countries where Notifiable Avian Influenza (NAI) has been detected and imposes a country-wide ban. The Panel thereby found that S.O.1663(E) evidently fails to recognize of the concepts of pest- or disease-free areas by levying a country-wide ban. In sum, on account of the findings drawn from the Livestock Act and S.O.1663(E), the Panel reached a conclusion that India's AI measures violate Article 6.2, first sentence.

Next, the Panel examined to the US argument that India's defiance of recognition of disease-free areas with regards to AI "preclude it from determining AI-free areas based on the factors listed in Article 6.2, second sentence."[63] Based on the foregoing that failure to comply with Article 6.2, first sentence leads to violation of Article 6.2, second sentence, the Panel supported the US claim and resolved that India's AI measures also are inconsistent with Article 6.2, second sentence.

Turning to whether India's AI measures are inconsistent with Article 6.1, as mentioned above, the Panel was not able to see how a country can adapt its measures to the sanitary or phytosanitary characteristics of the area without

[63] WT/DS430/R. para. 7.693.

recognizing the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Consequently, as India was not able to recognize the concept of pest- or disease-free areas and areas of low pest or disease prevalence, the Panel concluded that India also failed to adapt its measures to the sanitary or phytosanitary characteristics of the area, which is inconsistent with Article 6.1, first sentence. Therefore, referring to the Panel's findings above that violation of Article 6.1, first sentence leads to a subsequent violation of Article 6.1, second sentence, India's AI measures were found to be also inconsistent with Article 6.1, second sentence. In sum, the Panel determined that India's AI measures neither complied with Article 6.1 nor 6.2 of the SPS Agreement.

The Appellate Body (AB) upheld the Panel's findings of the connection between Article 6.1 and 6.3 although it considered some of the claims to be broad. In response to India's argument that the Panel's application of the first sentence of Article 6.2 is fallacious because the Panel made the decision that India does not recognize the concepts of regionalization solely based on sections 3 and 3A of the Livestock Act, the AB advocated the Panel, claiming that the Panel justly applied Article 6.2 by taking into account India's AI measures as a whole.[64]

[64] WT/DS430/AB/R.

4.2.2. US – Animals Case

Argentina brought the dispute to the WTO, concerning US import prohibition measures on beef originating from a certain region in Northern Argentina, as well as on the importation of animals, meat and other animal products from the Patagonia, as a result of its denial to recognize the territory of Patagonia as an FMD-free region.[65]

The main argument of Argentina in this dispute regarding regionalization measures was that the US acted inconsistently with Article 6.1 by prohibiting imports of animals and animal products from Patagonia. Moreover, Argentina insisted that because Article 6.2 provides a supplementary requirement to the obligations laid out in Article 6.1, violation of Article 6.1 concomitantly entails the violation of Article 6.2. Therefore, Argentina's claim was that the FMD measures implemented by the US was inconsistent with both Articles 6.1 and 6.2. As for Article 6.1, Argentina claimed that the US FMD measure did not take into account the level of prevalence of specific diseases or

[65] FMD is a highly contagious disease that predominantly appears among (divided)-hoofed livestock and wildlife population. FMD has lethal consequences, especially among non-vaccinated young animals and could result in decreased milk production, perpetual hoof damage and chronic mastitis (inflammation of mammary glands and udders). Once a prevalent disease worldwide, FMD is no longer found in some provinces of North America and most parts of Europe; but strict attention is paid in international trade regarding FMD, as its highly contagious nature could result in the rapid spread of the disease. Hence, countries that have established an FMD-free status maintain stringent sanitary regulations on imports of animals, while countries not free of FMD face harsh restrictions in international trade. One of the eradication efforts of countries to achieve FMD-free status is vaccinating vulnerable animals against FMD (WT/DS447/R, para. 2.1-2.3).

pests in Patagonia South and Patagonia North B which have been recognized as FMD-free regions since 1976 and 1994 respectively. According to Argentina, the US disregarded the existence of eradication or control programs in Argentina, which were present under the auspices of National Food Safety and Quality Service (SENASA), a verified organization by Animal and Plant Health Inspection Service (APHIS) in past cases; and the appropriate criteria or guidelines developed by International Organizations, which in this case refers to the OIE who recognized Patagonia South and North B as FMD-free in 2002 and 2007 respectively.[66] Next, concerning Article 6.2, Argentina submitted that the US failed to base their measure on the geography of Patagonia, which is isolated from Northern Argentina and is distant from Corrientes, where FMD broke out in 2006; the ecosystem of Patagonia, as Patagonia has always naturally been FMD-free; and the existence of an effective surveillance and control program set out by SENASA, acknowledged by APHIS.[67]

The US refuted Argentina's argument concerning Article 6.1, asserting that it was still in the midst of adapting its SPS measures to the characteristic of the concerned regions. The US initially contended that the Members' obligation to adapt their measures to the sanitary or phytosanitary characteristics of an area should be read in accordance with the exporting Members' responsibility under

[66] WT/DS447/R, para. 7.627.
[67] WT/DS447/R, para. 7.628.

Article 6.3 to provide the necessary evidence proving that an area is pest-or disease free and are likely remain so.[68] The US pointed out that Article 6.3 implies the involvement of the importing Member in assessing the information provided by the exporting country and adjusting its measures with respect to the assessed characteristic of the area, which entails the possibility that the importing Member may not obtain adequate information to verify the exporting Member's statement. According to the US, such circumstances trigger the application of Article 5.7, which demands Members to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time. In this connection, the US stressed that there have been several modifications that delayed the US assessment of recognizing FMD-free areas in Patagonia since the first exchange of information between the two countries such as FMD outbreaks in North Argentina in 2003 and 2006 and Argentina's request to add Patagonia North B as an FMD-free area. In the US perspective, such events delayed progress of the APHIS's assessment of Argentina's FMD-free areas and thus claimed that APHIS was still in the process of adapting its measures to the characteristic of the area at the date of Panel establishment.[69]

[68] WT/DS447/R, para. 7.632.
[69] WT/DS447/R, para. 7.633.

Furthermore, the US did not acknowledge Argentina's reference to OIE's establishment of FMD-free status as appropriate criteria or guidelines developed by the relevant international organizations. In the view of the US, OIE standards on the determination of FMD-free countries or areas were "conclusions or outcomes" rather than a "criterion or guideline", which encompasses "directing or standardizing principles".[70] Turning to Article 6.2, the US claimed that its measures are consistent with the obligation to recognize the concepts of pest-or disease-free areas, as the legal arrangement of APHIS manages to recognize such concepts in 9 CFR 92.2 and 9 CFR 94.[71]

Before proceeding to investigating whether the US has acted inconsistently with Article 6.1 and 6.2, the Panel preliminarily examined the interpretation of Article 6. The Panel noted that "adaptation" of measures to the SPS characteristics of a region indicates that the measure "must be tailored or calibrated to the specific SPS characteristics of the area concerned"[72], which means more rigorous regulations should be imposed for products originating from an area, which manifests a higher level of risk and vice versa. Moreover, the Panel also took note of Article 6.1, first sentence, which requires Members to adapt their SPS measures to the SPS characteristics of an area, not only

[70] WT/DS447/R, para. 7.634.
[71] WT/DS447/R, para. 7.635.
[72] WT/DS447/R, para. 7.642.

"from which the product originated" but also "to which the product is destined". With regards to this provision, the Panel mentioned that in occasions where similar SPS conditions prevail in both territories of the importing and exporting Members, more lenient measures should be applied.[73]

Next, with regards to Article 6.2, the Panel noted that Article 6.2 denotes the requirements for Members "to accept the authority and validity" of the concept of "pest- or disease-free areas and areas of low pest or disease prevalence" and take them into consideration in the adaptation of SPS measures.[74] Looking into Article 6.3, the Panel pointed to the general understanding of the provision, which requires Members to not only provide necessary evidence to demonstrate that areas within their territories are pest- or disease-free but also that such areas are "likely to remain" pest-free or disease-free. Moreover, the Panel recalled the US claim that Article 6.3 prompts the application of Article 5.7 that allows importing Members to implement temporary measures based on the available information for a reasonable period of time. In this regard, the Panel asserted that such a claim connotes that US FMD measures do not violate Article 6.1 and 6.2, if their actions are found to be applicable to Article 5.7.

[73] WT/DS447/R, para. 7.642.
[74] WT/DS447/R, para. 7.647.

In terms of whether the US FMD measures fall into the scope of Article 5.7, the Panel sought to identify whether the US complied with the two requirements written under Article 5.7: the requirement to attain additional information necessary for a more objective assessment of risk and to examine the measure within a reasonable period of time. First, to figure out whether the US was in compliance with the former requirement, the Panel recalled from its earlier finding that the US "made no efforts after its site visit in September 2006 to seek information from SENASA on the situation in Northern Argentina until after this Panel was established", and that "with respect to Patagonia (including both Patagonia South and Patagonia North B) the US made no efforts to seek information after its site visit in February 2009 until after the establishment of the Panel."[75] Thus, the Panel determined that the US lacked efforts in obtaining additional information and concluded that the US failed to abide by the requirement of Article 5.7 to obtain the additional information necessary for a more objective assessment of the risk. Next, the Panel investigated whether the US reviewed the measure accordingly within a reasonable period of time. The Panel initially referred to the Panel's interpretation of the term "reasonable period of time" in EC – Biotech Products case, in which the Panel mentioned that the concept is not based on the length

[75] WT/DS447/R, para. 7.298.

of time but on whether the delay can be justified.[76] In examining US measures, the Panel looked back to its previous finding that several long-term undue delays were made by APHIS in reviewing its measures and thereby determined that the US failed to review its measures within a reasonable period of time. As a result, from the two findings, the Panel established that the US FMD measures are not applicable to Article 5.7. Hence, the Panel disregarded the US claim on the linkage between Article 6.3 and 5.7.

Subsequently, upon examining the relationship between Article 6.1, 6.2 and 6.3, the Panel contended that while Article 6.1 sets out a general obligation for Members to adapt their measures to the SPS characteristics of an area, a Member's consistency with Article 6.2 and the exporting Member's consistency with Article 6.3 may affect the Member's capability of imposing Article 6.1.[77] The Panel thereby found it appropriate to first examine Argentina's claims under Article 6.1 that the US failed to recognize the concept of FMD-free areas and that it failed to adapt its measures to the SPS characteristics of Patagonia. Accordingly, the Panel noted the fact that APHIS had not yet recognized Patagonia as an FMD-free area at the time when the Panel was established for this case, prohibiting the importation of FMD-susceptible animals, meats and animal products from the entire territory of

[76] WT/DS447/R, para. 7.301.
[77] WT/DS447/R, para. 7.655.

Argentina.[78] In this regard, the Panel found it necessary to examine whether the US failure to recognize FMD-free areas attributed to Argentina's incapability to objectively demonstrate that Patagonia was likely to remain FMD-free at the time of the establishment of the Panel. Yet, supported by evidence, the Panel found that APHIS was satisfied with the sufficient information it received on the FMD status of Patagonia at the time of the Panel's establishment and therefore determined that Argentina successfully demonstrated that Patagonia is likely to remain FMD-free. Moreover, based on the fact that Argentina let APHIS conduct site visits to Patagonia, the Panel considered that Argentina provided reasonable access for inspection, testing and other relevant procedures. Furthermore, the Panel rejected the US excuse for the delay in the recognition of Patagonia as an FMD-free region, asserting that it cannot serve as an excuse to get away from its obligation under Article 6.1. In sum, the Panel concluded that the US acted inconsistently with Article 6.1 by failing to adapt its measures to the SPS characteristics of Patagonia.

4.2.3. Russia – Pigs Case

Russia – Pigs case is a dispute raised by the EU regarding Russia's import restrictions on certain products from the EU, concerning the spread of

[78] WT/DS447/R, para. 7.669.

African swine fever (ASF).[79] ASF was nonexistent in the EU except for in the island of Sardinia prior to January 2014, when ASF broke out in Lithuania.[80] In 2016, ASF was found in Estonia, Latvia and Poland. In the case of Russia, ASF was found in late 2007 and was still found to be present in some parts of Russia in 2016. The EU challenged Russia on two distinct issues. One was that Russia violated Articles 6.1 and 6.2 of the SPS Agreement by imposing a EU-wide ban on certain imports concerning ASF and the other was that Russia violated Articles 6.1 and 6.2 of the SPS Agreement by banning imports from Estonia, Latvia, Lithuania and Poland.

The EU argued that both of Russia's measures violated Articles 6.1 and 6.2 of the SPS Agreement by failing to ensure that measures are adapted to the SPS characteristics of the areas from which the product originated and to which the product is destined, and that Russia disregarded the level of prevalence or absence of ASF, the existence of eradication or control programs, and appropriate criteria or guidelines which may be developed by the relevant international organizations. As for Article 6.2, the EU claimed that Russia did not recognize the concepts of ASF-free areas by prohibiting imports of products

[79] As a disease listed in OIE, ASF is a "highly contagious hemorrhagic disease of pigs, warthogs, European wild boar and American wild pigs, equally susceptible to all age groups" and its "mortality rate may be as high as 100%" (OIE General Disease Information Sheets: African Swine Fever).
[80] WT/DS475/R, para. 2.22.

concerning ASF, and that Russia also failed to base their determination of such areas on geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary and phytosanitary controls. The EU emphasized that consideration of geographical factors and the existence of surveillance measures are crucial for their country owing to their large territorial dimension. In this regard, the EU elaborated on the diverse measures they maintain in order to control ASF in live pigs and wild boars. Furthermore, the EU argued in connection to Article 6.3, that it has already provided more than sufficient information to Russia that the concerned areas are and are likely to remain ASF-free or areas of low pest or disease prevalence.[81]

Russia responded that its measures are in conformity with Article 6.1, 6.2 and 6.3, since its ASF measures are based on its intention not to recognize the EU states as ASF-free. Thus, Russia stated that its bans on imports from the concerned EU states, and its EU-wide ban was "objectively justifiable".[82] In fact, Russia claimed that their measures were in line with the OIE Terrestrial Code as well as Article 6 of the SPS Agreement. Russia also countered EU's claim that Russia defied Article 6.2 by demonstrating that Russia does indeed recognize the concepts of regionalization. As evidence, Russia invoked the Customs Union legislation and the 2006 Memorandum between Russia and the

[81] WT/DS475/R. paras. 7.333-7.336; WT/DS475/R. paras. 7.906-7.908.
[82] WT/DS475/R. para. 7.337.

EU. Lastly, with respect to Article 6.3, Russia contended that the EU did not comply with Article 6.3 of the SPS Agreement by not being able to objectively demonstrate that their four infected Member states are and are likely to remain pest- or disease-free areas and by failing to provide "timely, comprehensive and accurate information", necessary for evaluating the zones.[83]

The Panel initially considered whether Russia's EU-wide ban violated Article 6 of the SPS Agreement. Prior to its investigation of the dispute, the Panel noted that the zones of the exporting country couldn't be recognized without the existence of a verification procedure in the importing country that grants recognition of such areas. Therefore, the Panel determined it appropriate to first examine whether Russia recognized the concept of disease-free areas pertinent to Article 6.2.[84] The Panel referred to Russia's claim that the requirement under Article 6.2 to recognize the concept of disease-free areas is an "abstract idea and is not linked to specific areas of a given exporting Member".[85] Correspondingly, the Panel took note of Russia's presentation of evidence of recognizing ASF-free areas, mentioning Customs Union Decision No. 317 and the 2006 Memorandum between Russia and the EU. In close examination of the language of the Customs Union Decision No. 317 and the

[83] WT/DS475/R. paras. 7.337-7.339; WT/DS475/R. paras. 7.909-7.911.
[84] WT/DS475/R. para. 7.365.
[85] WT/DS475/R. para. 7.368.

2006 Memorandum between the two countries, the Panel found that Russia does indeed recognize the ASF-free areas in abstract and therefore concluded that Russia's EU-wide ban does not violate Article 6.2.

Subsequently, the Panel turned to its finding on whether the EU acted consistently with Article 6.3 in providing the necessary information to objectively demonstrate that areas other than Estonia, Latvia, Lithuania, and Poland are ASF-free. In order to reach a conclusion, the Panel first attempted to fully interpret Article 6.3 through legal test. While acknowledging that it is the mandate of the exporting Member to provide the necessary information pursuant to Article 6.3, the Panel also perceived that Article 6.3 requires Members to not merely provide "information" but "evidence", and not just "demonstrate" but "objectively demonstrate" the disease status of its areas.[86] Thus, the Panel proceeded to explore the meaning of "necessary evidence" and what it means to "objectively demonstrate". Drawing on India – Agricultural Products and US – Animals case, the Panel determined that "necessary evidence" that serves to "objectively demonstrate" the disease status should include relevant information on geography, ecosystems, epidemiological surveillance, effectiveness of sanitary or phytosanitary controls, level of prevalence of specific diseases or pests, existence of eradication or control

[86] WT/DS475/R, para. 7.384.

programs, and information corresponding to appropriate criteria or guidelines developed by the relevant international organizations.[87] However, in terms of the extent of information demanded, the Panel insisted that it should be determined case-by-case.

As for the obligation to "objectively demonstrate", the Panel indicated that it requires "sufficient relevant scientific and technical evidence, as relevant for the circumstances of the particular dispute, to prove in an impartial manner that an area within its territory is free of a disease and is likely to remain so" instead of mere submission of general information.[88] Moreover, the Panel regarded Annex A(6) of the SPS Agreement as a useful guideline in clarifying what kind of evidence Members need to present in demonstrating that the area is disease-free. Yet, the Panel acknowledged the difficulty of presenting a "laboratory-type scientific proof" to prove that an area is disease-free and thereby pointed out that what Members need to provide as evidence differs according to the type of disease and the situation of the Member country.[89] Accordingly, the Panel established that the EU should have provided the information to Russia regarding epidemiological surveillance of ASF, the effectiveness of sanitary or phytosanitary controls in respect of ASF, regarding

[87] WT/DS475/R, para. 7.389.
[88] WT/DS475/R, para. 7.391.
[89] WT/DS475/R, para. 7.400.

ecosystems, the presence of ASF in wildlife, and the level of prevalence of ASF.[90]

Next, the Panel turned to examine the information necessary in order to fulfill the requirement to objectively demonstrate that disease-free areas are "likely to remain" disease-free pursuant to Article 6.3. Based on the AB interpretation of "likelihood" in Australia – Salmon case, the Panel determined that objective demonstration of the likelihood that the area will remain disease-free requires Members "to provide the necessary evidence to support that there is 'probability' that the disease-free status will be maintained in the particular area."[91] The Panel further added that qualitative evidence should include information on the "nature of the disease and the natural vectors that could spread the disease in the context of the effectiveness of the control measures that the exporting Member has in place for the particular disease."[92] Also, taking into consideration the fact that wild boars are the hosts of the highly contagious ASF disease, the Panel deemed it important to indicate the presence of wild boars and the exact location or proximity of wild boars from the asserted ASF-free areas. Moreover, the Panel found it crucial for the exporting Member to provide evidence regarding the efficiency of their control measures.

[90] WT/DS475/R, para. 7.404.
[91] WT/DS475/R, para. 7.406.
[92] WT/DS475/R, para. 7.406.

In the Panel's view, such evidence should include "evidence with respect to measures to prevent the entry and spread of the disease, the emergency actions adopted in case of an outbreak of the disease, and, when relevant, the eradication of programs of the disease in areas where it occurs."[93] Yet, above all, the Panel insisted that an assessment of the evaluation of the exporting Member's veterinary services is crucial so that the importing Member can trust the information provided by the exporting Member.[94] Thus, the Panel regarded that the importing Member should provide evidence that the exporting Member's veterinary authorities are qualified.

On the basis of the findings above, the Panel asserted that the EU should have provided information regarding the effectiveness of their control measures to Russia in order to objectively demonstrate that the concerned areas are likely to remain ASF-free. Therefore, the Panel insisted that it will go over whether the EU has provided information on the surveillance program, diagnostic analysis, measures for early detection and response, including movement control; and eradication of the disease.[95] The Panel thus examined the information provided by the EU to Russia from January 2014. As a result, the Panel found that the EU provided all the necessary information and determined

[93] WT/DS475/R, para. 7.408.
[94] WT/DS475/R, para. 7.409.
[95] WT/DS475/R, para. 7.413.

that the EU indeed objectively proved that their areas are ASF-free and likely to remain so.[96] On account of such findings, the Panel concluded that the EU satisfactorily demonstrated that their territories outside of Estonia, Lithuania, and Poland are ASF-free.

Then, the Panel turned to examine the EU's claim that Russia failed to adapt its measures to the SPS characteristics of the EU and Russia by imposing a EU-wide ban. In this regard, the Panel reviewed the legal test. On the basis of the findings of the US – Animals case, the Panel determined that it should "examine the evidentiary record and make an objective assessment, pursuant to its obligation under Article 11 of the DSU, or whether the challenged measure is adapted to the relevant ASF characteristics of the area where the products at issue originate and of the area to which they are destined."[97] Thereby, the Panel moved on to find out whether the EU-wide ban is adapted to the SPS characteristics of the EU regions outside Estonia, Latvia, Lithuania, and Poland and the SPS characteristics of Russia as well.

Prior to examining whether Russia ensured that its EU-wide ban is adapted to the SPS characteristics of the area from which the product originated and to which the product is destined, the Panel contended that it is necessary to first look into the SPS characteristics of each of the relevant areas and

[96] WT/DS475/R, paras. 7.445-7.447.
[97] WT/DS475/R, para. 7.471.

subsequently investigate whether the EU-wide ban is adapted to them.[98] Hence, the Panel referred to its previous finding that the EU objectively demonstrated that their territories outside Estonia, Latvia, Lithuania and Poland are ASF-free areas. In light of this conclusion, the Panel viewed that imposing a EU-wide ban, disregarding the presence of ASF-free areas result in the failure of Russia to adapt their measures to the SPS characteristics of the EU. Further pointing out the fact that Russia experienced ASF outbreaks since 2007, the Panel noted in this regard that if the importing country exhibits similar SPS characteristics to that of the exporting country, the importing country could be required to take on more lenient SPS measures, as discussed by the Panel in the US – Animals case.[99] In addition, the Panel was in agreement with the Panel in US – Animals case in that compliance with the second sentence of Article 6.1 to take into account the listed factors is "intrinsically connected to the obligations relating to the assessment of risks under Article 5 of the SPS Agreement".[100] The Panel found it indisputable that Russia did not carry out its measures on the basis of risk assessment and added on that the failure to conduct risk assessment "limits a Member's ability to assess the SPS characteristics from where the products in

[98] WT/DS475/R, para. 7.473.
[99] WT/DS475/R, para. 7.478.
[100] WT/DS475/R, para. 7.481.

question originate."[101] Based on the foregoing, the Panel concluded that Russia acted inconsistently with Article 6.1 by failing to adapt its measure (EU-wide ban) to the ASF conditions of the EU and Russia.

Next, the Panel proceeded to examine whether Russia's measure of banning imports from the areas of Estonia, Latvia, Lithuania, and Poland is in compliance with Article 6.1, 6.2 and 6.3 of the SPS Agreement. The Panel followed the analytical steps applied in addressing the issue of the EU-wide ban. First, in examining whether Russia recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, the Panel recalled the previous finding that Russia is consistent with Article 6.2 regarding its EU-wide ban. The Panel considered that such consequence could be applied in the same manner to Russia's ban on certain imports from Estonia, Latvia, Lithuania, and Poland.[102] Therefore, the Panel concluded that Russia acted consistently with Article 6.2.

The Panel then turned to investigate whether the EU objectively evidenced that their territory of Estonia, Latvia, Lithuania, and Poland are and are likely to remain pest- or disease-free areas or areas of low pest or disease prevalence, pursuant to Article 6.3. For investigation, the Panel conducted the same legal test as it did in its findings for the EU-wide ban. As mentioned

[101] WT/DS475/R, para. 7.482.
[102] WT/DS475/R, para. 7.925.

above, the Panel examined what information is required as "necessary evidence" for the purpose of "objectively demonstrating" that areas are ASF-free and are "likely to remain so". Given the different ASF situations and different information provided by the EU with respect to each of the four states, the Panel found it necessary to observe the information provided by the EU to Russia.[103]

In examining whether the EU provided the necessary evidence, the Panel looked at whether the EU provided evidence with respect to geography; epidemiological surveillance of ASF; the effectiveness of sanitary or phytosanitary controls in respect of ASF; regarding ecosystems, in particular the presence of ASF in wildlife and the patterns of behavioral ecology in wildlife; the level of prevalence of ASF; and the existence of eradication or control programs.[104] After examining information provided by the EU pertaining to each of the categories, the Panel concluded that the EU objectively and promptly demonstrated the presence of ASF-free areas within the four Member States.

Yet, the Panel casted doubt on whether the EU was able to objectively demonstrate that the ASF-free areas in its four Member States are likely to remain so. The Panel expressed that it will proceed with its examination

[103] WT/DS475/R, para. 7.930.
[104] WT/DS475/R, para. 7.939.

according to the chronological order of the outbreak of ASF, starting from Lithuania, Poland, Latvia and then Estonia.[105] The Panel observed that all ASF outbreaks except for one case happened within the infected and buffer zones. Accordingly, the Panel noted that ASF outbreaks within the buffer zone do not affect the range of disease-free areas and thus based on the information provided as of 11 September 2015, concluded that the EU objectively evidenced that disease-free areas within Lithuania are likely to remain so. Likewise, in the subsequent findings, the Panel found that the EU justly established that disease-free areas within Poland and Estonia are likely to remain so.

However, the Panel noted that the case for Latvia is somewhat different from Lithuania and Poland in that ASF broke out outside the areas designated as infected or buffer zones and that the areas where ASF broke out are distant from each other. The Panel thereby questioned the effectiveness of the EU's establishment of surveillance and protection zones in Latvia prior to the breakout.[106] In addition, the Panel maintained that the EU failed to provide information on its eradication plan in Latvia in a timely manner. Although EU did submit sufficient information regarding the measures adopted in Latvia, the Panel claimed that the EU did not provide "updated and additional information

[105] WT/DS475/R, para. 7.968.
[106] WT/DS475/R, para. 7.990.

on Latvia's early detection, surveillance and eradication plans after the outbreaks.[107] On this basis, the Panel claimed that the EU acted inconsistently with Article 6.3 by failing to objectively demonstrate that the disease-free areas within Latvia are likely to remain disease-free. On the other hand, with regards to Lithuania, Poland and Estonia, the Panel stated that the EU provided necessary evidence to objectively demonstrate that there are ASF-free areas within each of the three States and are likely to remain so.[108]

Lastly, the Panel examined the EU's argument that Russia's ban on certain imports from Estonia, Latvia, Lithuania and Poland violates Article 6.1 of the SPS Agreement by failing to ensure that their measures are adapted to the SPS characteristics of the concerned areas. The Panel again applied the same legal test and standard of review, adopted to investigate the EU-wide ban. The Panel referred to AB's claim in India – Agricultural Products case that the importing Member country may still be found to violate Article 6.1 although the exporting Member country does not provide an objective demonstration pursuant to Article 6.3.[109] Also, the Panel invoked its previous finding that the EU managed to objectively demonstrate that there are disease-free areas within its four Member states, which includes Estonia, Latvia, Lithuania and Poland.

[107] WT/DS475/R, para. 7.995.
[108] WT/DS475/R, para. 7.1003.
[109] WT/DS475/R, para. 7.1010.

Among the four States, the Panel recalled that the EU successfully evidenced that three of the Member States except for Latvia are likely to remain disease-free. Afterwards, the Panel considered it necessary to examine the most recent information on ASF outbreaks of each of the concerned Member States due to the "ongoing nature of the obligation to ensure adaptation pursuant to Article 6.1."[110] Looking into the detailed report on recent ASF outbreaks, the Panel concluded that it is without doubt that there were areas within Estonia, Latvia, Lithuania and Poland that remained ASF-free as of August 2015.[111] In light of such finding, the Panel claimed that Russia's ban on certain imports originating from Estonia, Latvia, Lithuania and Poland, disregarding the presence of ASF-free areas in these areas shows that Russia failed to ensure that its SPS measures are adapted to the SPS characteristics of the four states.

Furthermore, recalling that Russia is not an ASF-free country, the Panel contended that Russia therefore should implement more lenient measures regarding ASF. In addition, the Panel took note of the Panel's interpretation in the US – Animals case that the Member's obligation pursuant to the second sentence of Article 6.1 requires the assessment of risks pursuant to Article 5 of the SPS Agreement. Yet, the Panel noted that Russia clearly did not base its measures on risk assessment, thereby undermining its ability to assess the SPS

[110] WT/DS475/R, para. 7.1014.
[111] WT/DS475/R, paras. 7.1015-7.1018.

characteristics of the area from which the product originated and to which the product is destined.[112] Based on the foregoing, the Panel determined that Russia disregarded the SPS characteristics of Estonia, Latvia, Lithuania and Poland as well as that of its own territory in imposing a ban on the four EU Member states and further asserted that Russia did not base its assessment of the SPS characteristics of the region on risk assessment. Consequently, the Panel concluded that Russia acted inconsistently with Article 6.1 in imposing a ban on ASF related imports from Estonia, Latvia, Lithuania and Poland.

In response to Russia's claim that the Panel neglected the "scientific and technical evidence relied on by the importing Member" in its findings with respect to Article 6, the AB opined that Article 6.3 itself does not address the importing Member's obligation and therefore, dismissed Russia's assertion.[113] The AB also opposed Russia's assertion that the Panel overlooked the fact that Article 6.3 envisages some time period for the importing country to assess the evidence submitted by the exporting Member. The AB reasoned that although it is true that sufficient time is required for a Member to adapt its measures to regional conditions, such an obligation does not fall into the scope of Article 6.3, but rather Articles 6.1 and 6.2. Therefore, the AB upheld the Panel's decision that EU is in compliance with Article 6.3 by providing the necessary

[112] WT/DS475/R, para. 7.1026.
[113] WT/DS475/AB/R, paras. 5.67-5.75.

evidence to objectively demonstrate that areas within its four Member states and areas outside of the states are ASF-free and that the areas within the four Member states except for Latvia and areas outside of the affected states are likely to remain ASF-free.[114] In addition, the AB upheld the Panel's conclusion that a country can be found to have violated Article 6.1, although it has not fully provided the necessary information pursuant to Article 6.3. Thus, the AB agreed that Russia acted inconsistently with Article 6.1 by banning imports from Latvia. However, the AB considered that the Panel did not provide a comprehensive reasoning, and thus modified the Panel's findings without altering the conclusion.[115] On the other hand, disapproving of the Panel's claim that Article 6.2 "requires merely an acknowledgement of the concept of regionalization in the form of 'abstract ideas'", the AB reversed the Panel's finding that Russia recognized the concepts of regionalization pursuant to Article 6.2.[116]

5. Regionalization Provisions within RTAs

Although most RTAs incorporate separate chapters on SPS measures, relatively few elaborate on the issue of adaptation to regional conditions. In fact, the WTO report on RTAs observed that only around 31 percent of the RTAs

[114] WT/DS475/AB/R, paras. 5.76-5.88.
[115] WT/DS475/AB/R, paras. 5.93-5.108.
[116] WT/DS475/AB/R, para. 5.153.

include provisions on adaptation to regional conditions. Yet, among the RTAs containing regionalization principles, three quarters were found to contain SPS-plus elements that go beyond the provisions stipulated in Article 6 of the SPS Agreement.[117] This chapter analyzes the regionalization provision in a number of FTAs and TPP and examines whether such provisions have SPS-plus elements.

5.1. FTA

EU – Colombia, Peru FTA

Although the general framework of the regionalization chapter of the FTA text between EU, Colombia and Peru is based on Article 6 of the WTO SPS Agreement, some provisions go beyond that of the WTO SPS Agreement. One such SPS-plus arrangement involves the agreement of the parties to let the SPS sub-committee come up with procedures for recognizing regionalization principles. In addition, the FTA also includes a provision that obliges the importing party to provide a detailed account on its reasons for rejecting the recognition of zones, upon request of the exporting country. Furthermore, the FTA briefly mentions that parties should recognize the principle of compartmentalization established by the OIE.

EU – Chile FTA

[117] Acharya (2016), para. 2.15.

The EU – Chile FTA contains a detailed agreement on regionalization measures. The Agreement is peculiar, in that it provides a comprehensive procedure for the recognition of free areas, stipulating explicit time frames for each of the steps. The Agreement establishes separate procedures for recognition of disease-free areas and pest-free areas. As for animal diseases, the exporting party should first request the importing party for recognition of its regionalization measures and submit relevant information. The importing party should then proceed within 15 working days from the date of receipt of the request and decide to request additional information, consultation or verification. Additional information should be reviewed within 15 days and verification should be processed within 15 days. As for pests, the procedures are similar, but the assigned time frame for the steps are longer. The importing country should proceed with the request within three months from the date of receipt of the request. Additional information should be reviewed within three months following the receipt, and verification should be processed within 12 months.

Korea – Chile FTA

The majority of the text of the Korea – Chile FTA article on Adaptation to Regional Conditions is a mere reiteration of Article 6 of the WTO SPS Agreement. It contains one SPS-plus provision requiring the rejecting party to

notify the technical reasons for its decision not to recognize the exporting country's regionalization measures.

China – Switzerland FTA

While China and Switzerland agreed to address issues on adaptation to regional conditions in line with the WTO SPS Agreement in their FTA, some provisions go beyond the scope of the SPS Agreement. Interestingly, both parties agreed to take into account the Guidelines to further the Practical Implementations of Article 6 of the Agreement on the Application of SPS Measures, which was laid down by the SPS Committee and the relevant international organizations in 2008. The FTA also elaborates on incidents where infections occur in a pest or disease-free area or area of low pest or disease prevalence. China and Switzerland agreed that in such circumstances, both parties should do their best to recover their original status on the basis of risk assessment, taking into consideration the standards, guidelines and recommendations set out by the relevant ISSBs.

China – Peru FTA

The FTA between China and Peru on recognition of disease-free areas and areas of low pest or disease prevalence emphasizes timeliness of both parties in their recognition process. The Agreement indicates that the importing party shall proceed "in an expeditious way" in recognizing zones that have

acquired recognition from relevant international organizations, while the importing party shall "in a reasonable time" determine recognition of zones that have not acquired recognition from relevant international organizations.[118] In addition, parties agreed to expeditiously regain the status in circumstances where an established pest- or disease-free area or area of low pest or disease prevalence have been affected.

China – New Zealand FTA

China – New Zealand FTA provision on adaptation to regional conditions is remarkable because the two countries agreed to cooperate in establishing their own principles, standards and procedures for regionalization and record it in the Implementing Agreement: Chapter 7 C (1). The FTA therefore obliges both parties to recognize zones based on the standards set down in the Implementing Agreement. Furthermore, the Agreement stipulates that decisions for the status of requested areas and the measures to be applied to maintain the status should be done through the Joint Management Committee and that such decisions should as well be recorded in the Implementing Arrangement.

Peru – Singapore FTA

[118] China – Peru FTA.

The regionalization provision of Peru – Singapore FTA is rather short, comprised of two short paragraphs. It especially puts emphasis on the time frame of the recognition procedure. In the first paragraph, it obliges the importing party to respond to the exporting party's request for recognition of zones within a specific time period, mutually agreed by the parties. The second paragraph of the Agreement states that in the presence of a preceding recognition by relevant international organizations, the importing party should expeditiously consider recognizing the requested areas as pest or disease-free or areas of low pest or disease prevalence.

NAFTA

NAFTA also involves an Article on adaptation to regional conditions. The Agreement first repeats Article 6 of the SPS Agreement, and then further states SPS-plus provisions. In the Agreement, the parties draw a distinction between the pest- or disease-free area and area of low pest of disease prevalence, allowing countries to implement different risk assessments and measures with respect to the different status of the area. Moreover, NAFTA sets down the principle of non-discrimination in the implementation of regionalization. It specifically states that Members should not discriminate among parties where same level of risk prevail and requires Members to adopt equivalent risk assessment techniques in assessing the status of the areas.

Furthermore, in NAFTA, parties agreed that the importing party should upon request, make an arrangement with the exporting party regarding the requirements necessitated for permitting imports of goods originating from an area of low pest or disease prevalence and meeting the importing party's ALOP.

5.2. TPP

The TPP agreement on regionalization expands on Article 6 of the WTO SPS Agreement. The TPP initially states that parties recognize the OIE concept of zoning and compartmentalization, in addition to regionalization. In addition, it contributes to enhancing the transparency of the implementation of regionalization measures by providing the administrative procedures of the recognition process. The explanation on the procedure does seek to prevent undue delays, but it does not specify the exact time frame for each of the steps. The TPP also acknowledges that the importing party may not at all times accept the exporting country's request to recognize its pest- or disease-free areas, or areas of low pest and disease prevalence. However, in such circumstances, the TPP requires the importing country to explain its reasons for its denial. Moreover, the TPP states that in cases where an incident occurs that the importing party has to make adjustments to its regionalization measures, the parties should cooperate to decide whether the former status could be retrieved.

Most RTAs that involve provision on regionalization presented SPS-plus features. Table 2 below categorizes the above-mentioned RTAs according to the types of SPS-plus regionalization provisions that the RTAs include. It can be observed that many countries agreed to further improve transparency and emphasize timeliness in the regionalization provisions in RTAs. While most of the RTAs do not address issues that were mentioned at the 2006 SPS Enhanced meeting, EU – Chile FTA maintains one of the most comprehensive provisions on regionalization, in which parties have agreed on precise time frames in the process of regionalization in order to forestall the occurrence of undue delays.

Table 2. SPS-plus regionalization provisions in RTAs

	Types of regionalization provisions (SPS-plus)	RTAs
1	Provision to recognize concepts of **zoning and compartmentalization**	EU-Colombia, Peru FTA TPP
2	Provision **obliging the importing country to provide a rationale** for its determination to reject the exporting country's regionalization request	EU-Colombia, Peru FTA Korea-Chile FTA TPP
3	Provision to **create own principles, standards and procedures** for regionalization	China-New Zealand FTA
4	Provision on **non-discrimination**	NAFTA
5	Provision on the **detailed administrative procedures** for recognition of regionalization	EU-Chile FTA (with explicit timeframe) TPP
6	Provision on **expeditious recognition** in the presence of recognition from relevant international organizations	China-Peru FTA Peru-Singapore FTA
7	Provision to **cooperate to retrieve the original status** in case of pest or disease outbreaks in a free area	China-Switzerland FTA TPP

6. Future Challenges

Despite series of efforts to enhance the implementation of Article 6 of the SPS Agreement, little progress has been made. The 2008 guidelines to further the practical implementation of Article 6 devised by the SPS committee serves to elaborate on the administrative steps of implementing regionalization, reflecting the Members' complaints discussed in previous meetings. However, the fact that the 2008 guideline is unbinding undermines its effectiveness.

Establishing a detailed harmonized guideline on regionalization procedures through multilateral arrangements is optimal. However, as observed in recent discussions for enhancing the implementation of Article 6 at the WTO, harmonizing food safety regulations under the multilateral regime is difficult because lawmakers hold varying interests. In turn, bilateral agreements are more efficient means of coordinating different interest, as agreement between two countries reduces the complexities experienced in multilateral negotiations and also allows active involvement of private sectors such as professionals in the negotiation process.[119] In the previous chapter, it has been observed that most regionalization provisions in RTAs go beyond the SPS Agreement, but relatively few address the issue of undue delays or discrimination in detail.

[119] Lin (2012).

Bilateral efforts to establish a detailed administrative procedure for implementation on regionalization taking into account their previous experience could contribute to the reduction of uncertainties in the application of the regionalization principle. Hence, in order to achieve substantive improvements on the implementation of Article 6 of the SPS Agreement, efforts for advancement should be made, not only at the multilateral level but also at the bilateral level through development of SPS-plus provisions.

In addition, future discussions on enhancing the implementation of the regionalization principle should address not only the legal issues, but also the economic issues that hamper countries from effectively implementing the regionalization principle. Back in 2007, Loppacher argued that the regionalization provision gives rise to the issue of the economic incentive to smuggle. She argued that subdivision of a nation according to its disease status and allowing trade from non-infected areas result in price differences; higher price is established for products originating from non-infected areas while products originating from infected areas have a relatively lower price. According to Loppacher, such price differences create the incentive to smuggle products from the infected areas into the non-infected regions, which could cause big threats to human and animal health worldwide.[120]

[120] Loppacher et al (2007).

More recently, Bown and Hillman argued that information asymmetry was the cause of the undue delay in the WTO's US – Argentina Animals dispute. In order to explain information asymmetry, Bown and Hillman first examined the economic incentive of the farmers to make costly investments in biosecurity measures so as to reduce the possibility of FMD outbreaks. They found that farmers are likely to make investments only to the point that maximizes profits due to the fact that the benefit gained from costly FMD prevention efforts do not wholly go to the farmer; instead, such measures provide positive externalities to other farmers as well. Bown and Hillman suggested that the solution is for the government to oblige individual farmers to invest in biosecurity measures. However, they insisted that such measures bring about information asymmetry that further lead to moral hazard, since it is very costly for governments to oversee whether each of the individual farmers are keeping the rules. Then, Bown and Hillman discussed the farmer's incentive to report disease outbreaks. They asserted that if the farmers do report the outbreaks, the farmers would certainly experience loss, as the government will mandate them to undertake certain measures to eradicate the disease. On the other hand, if the farmers decide not to report the outbreak, there is some possibility that the disease will not become known to the government and will

not spread, which incurs smaller loss for the farmer.[121] Therefore, by analyzing the economic incentive of the farmers to report disease outbreaks to the government, Bown and Hillman concluded that farmers are more likely to hide such information from the government because the loss that the farmers experience is less if they do not report the disease outbreaks. Based on the analysis, Bown and Hillman argued that the delay that the US experienced in assessing the disease status of Argentina was in part due to US distrust in the Argentine government stemming from such information asymmetry.

Taking account of Loppacher and Bown and Hillman's economic approach to point out the fundamental issues that occur from implementing the regionalization principle, it can be found that the uncertainties in the application of the regionalization concept is not only caused by the ambiguities in the legal interpretation of the regionalization provision or lack of a detailed administrative procedure, but also by the various economic incentives of the exporting and the importing countries. Therefore, it is essential that future discussions in the WTO for enhancing the implementation of the regionalization principle also address the more fundamental reasons to why countries experience difficulties in applying regionalization by taking a legal-economic approach.

[121] Bown and Hillman (2017)

7. Conclusion

The regionalization provision in the SPS Agreement is an effective means of securing international trade in events of pest or disease outbreaks by allowing countries to divide the territory of a country according to its pest or disease status. Nevertheless, implementation of Article 6 gives rise to uncertainties that hamper the effective application of the concept of regionalization. In the 2006 enhanced meeting on international trade, issues of undue delays, acknowledgement of OIE recognition and non-discrimination were the key concerns of the Members.

However, although series of discussions have been undertaken at the WTO to improve the implementation of Article 6 of the SPS Agreement, hardly any substantive progress has been made. The SPS Committee took the discussion a step forward by designing the guidelines to further the practical implementation of Article 6, which provide helpful reference for countries. Yet its significance is unclear owing to its non-binding nature. Also, looking at RTA arrangements on the provisions on regionalization, although SPS-plus aspects were observed, many of them failed to address the concerns that were mentioned by Members in the informal meeting on Article 6.

This paper suggests that advancement in the implementation of regionalization measures should be made through both multilateral and bilateral

arrangements. At the WTO, further efforts should be made to coordinate a legally binding set of guidelines for more certain application of the regionalization concept. In addition, countries should seek to set down a more detailed administrative process for the recognition of regionalization through bilateral negotiations. Yet, discussions for enhancing the application of the regionalization principle should not be limited to the legal aspect; the economic incentive issues associated with regionalization should be tackled in future discussions to solve the fundamental difficulties that countries face with respect to implementation of the regionalization principle.

Bibliography

Books

Acharya, R. *Regional Trade Agreements and the Multilateral Trading System*. Cambridge: Cambridge University Press, 2016.

A positive agenda for developing countries: issues for future trade negotiations. New York: United Nations, 2000.

Devorshak, Christina. *Plant pest risk analysis: concepts and application*. Cambridge, MA: CABI, 2012.

Epps, Tracey. *International trade and health protection: a critical assessment of the WTO's SPS agreement*. Northampton, MA: Edward Elgar, 2008.

Gruszczynski, Lukasz. *Regulating health and environmental risks under WTO law: a critical analysis of the SPS agreement*. New York, NY: Oxford University Press, 2010.

Kastner, Justin. *Food and agriculture security: an historical, multidisciplinary approach*. Santa Barbara, CA: Praeger, 2011.

Kennedy, and Koo. *Agricultural trade policies in the new millennium*. Binghamton, NY: The Haworth Press, 2002.

Scott, Joanne. *The WTO agreement on sanitary and phytosanitary measures: a commentary*. New York, NY: Oxford University Press, 2007.

Rudiger, Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr. *WTO: Technical barriers and SPS measures*. Leiden: Koninklijke Brill, 2007.

Sonnenfel, Albert, Jean-Lois Flandrin, and Massimo Montanari. *Food: a culinary history*. New York: Columbia University Press, 1999.

Trebilckock, M. J. *The regulation of international trade*. New York: Routledge, 1995.

Articles

Annad, Mel. "Regionalization of Trade in Livestock and Livestock Products." *International Agricultural Trade Research Consortium*, 2001.

Ackleson, Jason, and Justin Kastner. "Borders and Governance: An Analysis of Health Regulation and the Agri-food Trade." *Geopolitics* 16, no. 1 (2011): 7-26.

Bakshi, Nishita. "Sanitary and Phytosanitary Measures: The Case of Mexican Avocados." 2003.

Bown, Chad P., and Jennifer A. Hillman. "Foot-and-Mouth Disease and Argentina's Beef Exports: The WTO's US Animals Dispute." *SSRN Electronic Journal*, 2016.

Devorshak, Christina. "Area-Wide Integrated Pest Management Programmes and Agricultural Trade: Challenges and Opportunities for Regulatory Plant Protection." *Area-Wide Control of Insect Pests*: 407-15.

FAO. "Private Food Safety Standards: Their Role in Food Safety Regulation and their Impact." 2010.

Johnson, Renee. "Sanitary and Phytosanitary (SPS) Related Non-Tariff Barriers to Agricultural Trade." 2014.

Kahn, and Llado. "Implementation of the Compartmentalisation Concept: Practical Experience and Perspectives." *OIE Regional Commission*, 2014.

Kahn, Sarah. "The role of the World Organisation for Animal Health (OIE) n the development of international standards for laboratory animal welfare." *6th World Congress on Alternatives & Animal Use in the Life Sciences*, 2007.

Lin, Ching-Fu. "SPS-Plus and Bilateral Treaty Network: A 'Global' Solution to the Global Food Safety Problem?" *Wisconsin International Law Journal*, 694-734, 2012.

Loppacher, J. Laura, William A. Kerr, and Richard R. Barichello. “The Debate on Improving Implementation of the Regionalization Chapter of the SPS Agreement: Real Problems or Disguised Protectionism?” *Journal of World Trade* 41(4): 667-681, 2007.

Loppacher, J. Laura, William A. Kerr, and Richard R. Barichello. “Regional Management of Diseases and Pests to Facilitate Canadian Exports.” Canadian Journal of Regional Science. XXXI: 1, 39-54, 2008.

Micara, Anna G. “Regionalization Within the SPS Agreement: Recent Developments.” *International Economic Law*, 2016, 111-28.

Roberts, Donna. “Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary trade regulations.” *International Economic Law*, 1998, 377-405.

Saggi, Kamal, and Mark Wu. “Trade and Agricultural Disease: Import Restrictions in the Wake of the India Agricultural Products Dispute.” *SSRN Electronic Journal*, 2016.

Stoler, Andrew L. “TBT and SPS Measures, in practice.” *preferential Trade Agreement Policies for Development*: 217-233, 2011.

Unnevehr, Laurian, and Donna Roberts. “Food Safety and Quality: Regulations, Trade, and the WTO.” 2003.

Victor, G. David. “The sanitary and phytosanitary agreement of the world trade organization: an assessment after five years.” *International Law and Politics,* Vo.32:865, 2000.

GATT and WTO Documents

GATT. Agriculture Committee – Import Measures – Annex 4: Health and Sanitary Regulations Notified. COM.AG/W/68/Add.4.

GATT. Negotiating Group on Agriculture – Communication from the European Communities – Working Paper – Drafting of an Appropriate Framework of Rules for Sanitary and Phytosanitary Regulations. MTN.GNG/NG5/W/56. 1988.

GATT. Negotiating Group on Agriculture – Nordic Communication on Sanitary and Phytosanitary Issues. MTN.GNG/NG5/W/88. 1988.

GATT. Negotiating Group on Agriculture – Sanitary and Phytosanitary Issues – Communication from the Cairns Group. MTN.GNG/NG5/W/112. 1989.

GATT. Negotiating Group on Agriculture – Proposal on Special, Differential and More Favourable Treatment for Developing Countries – Communication from Brazil and Colombia. MTN.GNG/NG5/W/132. 1989.

GATT. Negotiating Group on Agriculture – Submission of the European communities on Sanitary and Phytosanitary Regulations and Measures. MTN.GNG/NG5/W/146. 1989.

GATT. Negotiating Group on Agriculture – Supplementary Submission of Japan on Sanitary and Phytosanitary Regulations and Measures. MTN.GNG/NG5/W/156. 1990.

GATT. Negotiating Group on Agriculture – Sanitary and Phytosanitary Issues – Supplementary Communication from the Cairns Group. MTN.GNG/NG5/W/164. 1990.

GATT. Negotiating Group on Agriculture – Working Group on Sanitary and Phytosanitary Regulations and Barriers – Communication from the United States regarding the International Office of Epizootics. MTN.GNG/NG5/WGSP/W/12. 1990.

GATT. Negotiating Group on Agriculture – Working Group on Sanitary and Phytosanitary Regulations and Barriers – Draft Agreement on Sanitary and Phytosanitary Measures – Note by the Nordic Countries. MTN.GNG/NG5/WGSP/W/21. 1990.

GATT. Negotiating Group on Agriculture – Working Group on Sanitary and Phytosanitary Regulations and Barriers – Summary of the Main Points Raised at the Eighth Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers – Note by the Secretariat. MTN.GNG/NG5/WGSP/W/24. 1990.

WTO. Committee on Sanitary and Phytosanitary Measures – Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures. G/SPS/48. 2008.

WTO. Committee on Sanitary and Phytosanitary Measures – The Implementation of Article 6 (Regionalization) of the Agreement on the Application of Sanitary and Phytosanitary Measures. G/SPS/GEN/605. 2005.

WTO. Committee on Sanitary and Phytosanitary Measures – Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures – Communication from Argentina. G/SPS/GEN/606. 2005.

WTO. Committee on Sanitary and Phytosanitary Measures – Regionalization – Communication from Peru. G/SPS/GEN/607. 2005.

WTO. Committee on Sanitary and Phytosanitary Measures – Procedures for Recognition of Pest – or Disease-Free Areas or Areas of Loww Pest or Disease Prevalence under Article 6 of the SPS Agreement, On Regionalization – Communication from Colombia. G/SPS/GEN/611. 2005.

WTO. Committee on Sanitary and Phytosanitary Measures – Implementation of Article 6 of the SPS Agreement (Regionalization) – Communication from Canada. G/SPS/GEN/613. 2005.

WTO. Committee on Sanitary and Phytosanitary Measures – Implementation of Article 6 of the SPS Agreement – Communication from Egypt. G/SPS/GEN/630. 2006.

WTO. Committee on Sanitary and Phytosanitary Measures – Additional Comments on Article 6 of the SPS Agreement – Adaptation to Regional Conditions – Communication from the United States of America. G/SPS/GEN/631. 2006.

WTO. Report of the Appellate Body. EC – Measures Concerning Meat and Meat Products (Hormones). WT/DS26/AB/R. 1998.

WTO. Report of the Appellate Body. India – Measures Concerning the Importation of Certain Agricultural Products. WT/DS430/AB/R. 2015.

WTO. Report of the Appellate Body. Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union. WT/DS475/AB/R. 2017.

WTO. Report of the Panel. India – Measures Concerning the Importation of Certain Agricultural Products. WT/DS430/R. 2014.

WTO. Report of the Panel. United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina. WT/DS447/R. 2015.

WTO. Report of the Panel. Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union. WT/DS475/R. 2016.

OIE Documents

OIE International Zoo-Sanitary Code (1968)
OIE final report (1992)
OIE Terrestrial Animal Code

국문초록

WTO 위생 및 식물 위생 조치의 적용에 관한 협정 (SPS 협정) 제 6 조는 지역화에 관한 조항으로 회원국이 자국의 영토를 병해충 발생의 정도에 따라 구분하고 과학적으로 병해충 비발생 지역으로 입증 된 곳에 한하여 교역을 계속할 수 있도록 허용하고 있다. 하지만 지역화 조항의 간결함으로 인해 회원국들은 지역화 개념을 구현하는데 어려움을 겪어왔다. 이러한 문제를 해결하고자 WTO 회원국과 SPS 위원회는 지역화 개념이 설립된 1995 년 이후 지역화 개념의 이행을 개선하기 위해 꾸준히 노력해왔으나 큰 진척은 이루어지 못하였다. 본 논문은 SPS 협정 제 6 조의 초안 과정과 WTO 내에서 최근에 어떠한 논의가 이루어졌는지 면밀히 살펴봄으로써 지역화 개념의 이행을 개선하기 위한 시사점을 제공하고자 한다. 또한 SPS 협정 제 6 조에 관한 내용을 포함하는 지역무역협정을 분석하고 지역화 조항에 관한 과거 연구를 살펴봄으로써 지역화 조항의 개선을 위한 향후 과제를 제시하고자 한다.

주요어: 세계무역기구, SPS 협정, 지역화, SPS 위원회, 지역무역협정, 위생 및 식물 위생 조치

학번: 2015-25128